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THE TAFT-HARTLEY ACT AND COLLECTIVE BARGAINING

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INTRODUCTION.

The Labor-Management Relations Act of 1947,¹ more popularly known as the Taft-Hartley Act became law on June 23, 1947. It represents a sweeping departure from the philosophy of the Wagner Act,² which it amends. The latter Act was conceived on the principle that the basic cause of industrial disputes stemmed from the inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract and employers who fail to recognize and bargain with the representatives of the majority of their employees. Therefore, the Wagner Act proscribed various familiar unfair labor practices of employers and provided an easily accessible and simple election system to prove a union's majority in an appropriate bargaining unit to the end that free collective bargaining might take place over the terms and conditions of employment.

While the Taft-Hartley Act in its declaration of policy recognizes the continued existence of labor's inequality of bargaining power³ the crux of the new Act is announced by statement of a new policy which sets forth the need

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¹ U. S. Pub. L., No. 101, 80th Cong. 1st Sess. (June 23, 1947).

² 49 Stat. 449 (1935), 29 U. S. C., Sec. 151 *et seq.*

³ *Supra*, note 1, Sec. 1.

for restricting the powers of labor. Thus it is stated in the new Act that "certain practices by some labor organizations, their officers, and members, have the intent or the necessary effect of burdening or obstructing commerce through strikes and other forms of industrial unrest or through concerted activities which impair the interest of the public in the free flow of such commerce". In realization of this policy the new Act among other things outlaws the closed shop, restricts union shop and maintenance of membership agreements, proscribes unfair labor practices by unions, restricts the use of strikes and boycotts, authorizes damage suits against unions, regulates payments to union welfare funds and in many respects changes the heretofore simple election machinery of the National Labor Relations Board. Thus, nearly all phases of the collective bargaining process have been placed under extensive governmental regulation. Since the activities of labor organizations are primarily affected by the changes brought about by the new Act, the impact upon them in their conduct of collective bargaining is the thesis of this article. It is thereby anticipated that the practical affects of the new Act may be more clearly evaluated by management and the public.

I. CHANGES IN THE LAW GOVERNING FIRST STAGES OF COLLECTIVE BARGAINING.

The old Wagner Act was primarily concerned with the initial stage of collective bargaining, that is to accord protection to unions against various employer practices which were designed to abort unionism at its inception. Thus the old Act proscribed four main unfair labor practices on the part of the employer. While these unfair practices are part of the new Act as discussed *infra*, other clauses and provisions in the Act have the effect of mitigating the employer's obligations. The main employer unfair labor practices must therefore be considered in the light of their new meaning.

A. *Section 8(a)(1)*. Under the new Act, most of the familiar illegal employer techniques of interference with

or restraint or coercion of employees' union activities are still prohibited. Thus such activities as espionage and surveillance by employers of the union activities of their employees, use of violence against union organizers, interrogation of employees as to union membership or activity, or overtly coercive statements such as threatening to close a plant if it is unionized, or offering a wage increase if the plant is not organized, will still be enjoined by the Labor Board.

However, it seems clear that under the new Act it will be much more difficult to prove the coercive nature of many statements by an employer or his agent respecting joining or forming unions. This was accomplished by the adoption of Section 8(c) which provides that:

"The expressing of any views, argument, or opinion, or the dissemination thereof whether in written, printed, graphic or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act, if such expression contains no threat of reprisal or force or promise of benefit."

This language seems to affect the Board practice in many instances of reading into employer expression implications of reprisals or finding implied threats in such statements.⁴ Therefore, as a practical matter, labor organizations will be faced with the possibility of extensive employer propaganda during their organizational drives and thereafter, directed toward convincing employees not to join a union or perhaps to join a competing union.

B. *Section 8(a)(2)*. Under the amended Act, as under the Wagner Act, it is an unfair labor practice for an employer to dominate or interfere with the formation or administration of unions or to contribute financial or other support to them. The general rules developed by the Board regarding company dominated unions are therefore still in effect, but Section 10(c) of the new Act changes Board custom regarding dominated unions in one important respect. This clause requires the Board to apply the same rules to unaffiliated unions as it does to affiliated unions in

⁴ See Eleventh Annual Report of the National Labor Relations Board, p. 34.

deciding cases under Section 8(a)(2). That provision of the new Act is obviously directed toward the Board custom of ordering complete disestablishment of dominated independent unions, but in the case of dominated affiliated unions only ordering the employer to stop recognizing the union on the theory that since it is part of a national organization, it will soon free itself of domination. The probable effect of Section 10(c) upon Board policy will be that where the evidence of domination is mild, neither an independent or affiliated union will be disestablished, but where the evidence is otherwise, both independent and affiliated unions will be ordered disestablished. The new Act also assures that dominated independent unions which are not ordered disestablished by the Board will be placed on the ballot in the event of an election.⁵

C. *Section 8(a)(3)*. In this section discrimination in hire, or in tenure, terms, or conditions of employment for the purpose of encouraging or discouraging union membership is forbidden, as it was in the Wagner Act. However, two other provisions in the new Act significantly change the effect of this section. The first of these provisions, Section 8(c) which was discussed previously, permits an employer greater latitude in the expression of views, argument, or opinion. This free speech clause seems also intended to prevent the Labor Board from using anti-union statements, not overtly coercive in themselves, as a background setting to be relied upon as evidence of the illegal discharge of an employee. The second provision, Section 10(c) of the new Act, forbids the Board to order reinstatement or back pay for an employee who was suspended or discharged for cause. The practical effect of this clause appears to put a greater weight upon the employee or labor organization which contends that an illegal discharge has taken place although the burden of proving "cause" for discharge is still upon the employer. In any event, the effect of Section 8(c) and 10(c) will be to make it more difficult in the future to prove and to secure relief from a discharge or discrimination due to union activity.

⁵ *Supra*, note 1, Sec. 9(c)(2).

D. *Section 8(a)(5)*. This section is carried over in language from Section 8(5) of the Wagner Act, and repeats that it is an unfair labor practice for an employer to refuse to bargain collectively with the duly authorized representative of a majority of the employees in the appropriate bargaining unit. However, an important practical change in the enforcement of this provision is accomplished by Section 8(b)(3) which declares that it is an unfair labor practice for a union to refuse to bargain. Thus labor organizations can probably anticipate countercharges of refusal to bargain as a defense in many instances where complaints are instigated against employers under this section. Under the Labor Board's previous administrative practice, such a defense was invalid.⁶

It is also important to bear in mind that in the matter of evidence it will be more difficult in the future to prove unfair labor practices against employers than it was in the past. The Board Trial Examiners are directed to conform to the rules of evidence used in Federal Courts insofar as practicable.⁷ This means that the Board hearings will be more technical, and some of the previously admissible testimony to prove an employer's misconduct will be ruled out in the future. Furthermore, the Circuit Courts of Appeal which review the Board's findings and orders are given a greater latitude to review the evidence which the Board relied upon in issuing its order.⁸ It should also be noted that no charges will be entertained respecting unfair labor practices which occurred or ended six months before a charge was filed⁹ and that the Board is forbidden to handle a union's charge of unfair labor practice unless the union has complied with the new Act's requirements as to financial registration and non-Com-

⁶ See, however, the recent case of *National Labor Relations Board v. Times Publishing Co.*, 19 L.R. R.M. 1199, in which it was held that in certain situations the union's refusal to bargain in good faith may remove the possibility of negotiating and thus preclude a test of the employer's obligation to bargain.

⁷ *Supra*, note 1, Sec. 10(b).

⁸ For complete discussion see *New Labor Law*, C.O.H., Sec. 82. See also *N.L.R.B. v. Austin Co.*, 21 L.R.R.M. 2132, which holds that the scope of judicial review is only immaterially changed under the Taft-Hartley Act.

⁹ *Ibid.*, note 7.

munist affidavits.¹⁰ The effect of the latter prohibition however, is somewhat mitigated by the fact that employees still might file an unfair labor charge against an employer in their own name even though the labor organization which represents them cannot use the Board's processes.¹¹

While employers have received a general reduction in their obligations during the crucial organizational period, unions are for the first time limited in the conduct of organization drives. Section 8(b)(1) makes it a union unfair labor practice to restrain or coerce employees in their choice among two or more labor organizations, or to join or not to join a union. According to the Congressional history, this section is aimed at the extremist activity of some unions. Thus it is intended to cover coercive organizing by union "goon-squads", threats of increased dues and initiation fees if the employee fails to join before the union acquires bargaining rights, threats of violence or reprisal, or actual commission of violence in an organizational campaign, and threats to have an employee who refused to join a union discharged after negotiation of a union shop contract.¹² This Section, however, is not limited to correcting these abuses. It is also directed at electioneering statements by unions. In the past, the Labor Board has refused to set aside elections won by unions where the employer charged that the union issued false, or even defamatory language, on the theory that it cannot set itself up as the judge of union propaganda and in addition the company is free to answer such statements.¹³ Under the new Act, however, it is clear that the Board will have to police union propaganda and decide in each case whether the statements complained about were coercive, fraudulent or simply permissible propaganda. This does not mean that unions can not use every legitimate means of persuasion or argument in its organizational drives, for free speech is guaranteed by Section 8(c) to both unions and

¹⁰ *Supra*, note 1, Secs. 9(f) and 9(h).

¹¹ Sections 9(f) and (h) are limited in application to labor organization.

¹² For references to Congressional Record see New Labor Law issued by the Bureau of National Affairs, Appendix E(3).

¹³ *Matter of Maywold Hosiery Mills, Inc.*, 64 N.L.R.B. 146.

employers, but the dividing line between coercive and valid union propaganda is not clear and the possibility exists that a union-won election can be set aside if care is not exercised in the use of propaganda.¹⁴ Under Section 8(b)(1) the possibility also exists that primary organization strikes are forbidden, although judging from the Congressional history of the new Act, this is doubtful.¹⁵

II. REPRESENTATION PROCEEDINGS.

Changes in the regulations and policies governing representation cases under the new Act are very serious and should be carefully noted. While the new Act still avowedly functions to determine the collective bargaining representative of employees, many new provisions respecting representation matters have the undoubted practical effect of providing an opportunity for delay and even avoidance of this determination. Furthermore, the new regulations, respecting the determination of an appropriate unit, substantially alter the Board's past practice of including various categories of employees in a unit thought to be the most effective form of organization.

A. *Use of the Board.* Before a union can use the peaceful machinery of the Board to secure certification, it must now meet two requirements.

(1) It must file elaborate statements as to its organizational structure, finances, and other matters with the Secretary of Labor and furnish copies to all its members.

(2) All union officers, including local and national officers, must file affidavits with the Labor Board that they are not Communists. No labor organization may be certi-

¹⁴ Section 8(c) guarantees free speech to both unions and employers, but note that by implication statements containing threats of reprisal or force constitute an unfair labor practice. For detailed discussion, see New Labor Law issued by the Bureau of National Affairs, pp. 34, 35.

¹⁵ This section does not prohibit strikes for legitimate ends. As Senator Taft stated in the Congressional Record: "It would not prevent anyone from using the strike in a legitimate way, conducting peaceful picketing, or employing persuasion." Thus it appears that unless an organizational strike has as its object to coerce employees into joining a union or a particular union it will not violate the Act. (*See supra*, note 12.) Also note that the language of Sec. 8(b)(4)(B) does not affect organizational strikes of employees against their own employer.

fied unless it has complied with these two requirements.¹⁶ Furthermore, a recent ruling by the Board provides that even where a labor organization is an intervenor in a representation proceeding to protect bargaining rights in plants in which it has already won contracts, if the Board subsequently directs an election that union still may not be placed on a ballot unless it has complied with the financial registration and affidavit provisions of the Act.¹⁷ (It has also been previously indicated that a labor organization can not file unfair labor practice charges against an employer unless the requirements described above have been fully met.)

The denial of recourse to the peaceful machinery of the Labor Board by employees represented through labor organizations which can not or will not comply with the financial registration and Communist affidavit provisions of the new Act raises questions of constitutional law under the First Amendment and the due process clause of the Fifth Amendment. While it is not intended here to explore fully all aspects of this question, it should nevertheless be noted in passing that a possible basis of attack is:

(1) The provision of the Taft-Hartley Act which requires the filing of affidavits by each officer of a labor organization that such officer is not a member of the Communist Party or affiliated with such party affects freedom of political belief and the right to discuss publicly all matters of public concern through a legally constituted political organization contrary to the First Amendment.¹⁸ Furthermore, attack may be made on the statutory definition as to what constitutes affiliation with the Communist Party or support of any organization that advocates the overthrow of the government, on the ground that it is so indefinite and vague as to constitute a violation of the Fifth Amendment.

¹⁶ *Ibid.*, note 10.

¹⁷ *Matter of Kinsman Transit Co.* (8-R-2660) decided by the National Labor Relations Board on October 27, 1947.

¹⁸ "The freedom of speech and of the press guaranteed by the Constitution embraces at the least the liberty to discuss publicly and truthfully all matters of public concern without previous restraint or fear of subsequent punishment." (*Thornhill v. Alabama*, 310 U. S. 88 (1939)).

(2) Making the legal rights of employees to be represented by a labor organization conditional upon the possibility that one international or local officer of a labor organization refuses to furnish a non-Communist affidavit, may deprive such employees of rights without due process of law.

(3) The informational and procedural requirements of the financial registration provision of the new Act are so burdensome and arbitrary as to make compliance by labor organizations impossible, or at least so burdensome as to constitute a deprivation of the rights of employees to be represented by a labor organization.

(4) An additional objection to the registration and affidavit sections of the law may be on the ground that Communists are discriminately singled out over members of all other legal political parties and made to furnish affidavits of loyalty to the United States; that this section consequently constitutes class legislation in violation of due process of law.^{18a}

B. *The Employer Petition.* Under the Wagner Act, the Board only accepted an employer's petition for an election where two or more unions claimed a majority of the employees in a bargaining unit. The new Act now requires that an employer allege that a single union has presented a claim that it represents a majority of the employees or demands exclusive recognition in petitioning the Board for an election.^{18b}

One of the practical effects of the new rule governing an employer petition is to make possible a premature election since an employer may now petition for an election at a time when a union's organizational efforts are not completed. However, the law apparently makes allowances for this situation by providing that an employer can not file a petition for an election until a union has actually

^{18a} For other constitutional arguments and for a summary of the brief of the National Maritime Union filed with the District Court for the District of Columbia in a suit for declaratory judgment on the constitutionality of the filing requirements of the Taft-Hartley Act, see 21 L.R.R. 100.

^{18b} *Supra*, note 1, Sec. 9(c) (1) (B).

claimed a majority or demanded exclusive recognition.¹⁹ Thus a premature election may be avoided, if a union avoids premature claims for recognition.

An employer may also use the device of the employer petition to raise the question of whether the union represents a majority of the employees upon the termination or renewal of each collective bargaining contract. This may be accomplished by refusing to bargain at the end of the contract term until the union proves its majority. Once the union claims such a majority, the employer can petition for an election. However, the delay in collective bargaining inherent in such a procedure can be avoided if the Board will promptly dismiss such employer petitions if, after investigation, it is shown that no real question of the union's majority status exists.

A problem is presented under the new Act as to whether a labor organization may take part in an election held pursuant to an employer's petition where it has not complied with the provisions of the Act respecting financial registration and non-Communist affidavits. In this connection, it should be noted that Sections 9(f) and 9(h) which require the registration and affidavits, apparently limit these requirements to cases in which labor organizations invoke the Board's procedure, omitting the requirements when employers and employees file petitions. Nevertheless, in a recent case, the Board sustained a contrary conclusion.²⁰

C. Decertification Petition. The Labor Board is now required to hold a new election if 30% of the employees involved support a petition asserting that the labor organization formerly certified as bargaining agent no longer represents a majority of employees.²¹ Under the old Wagner Act, the Board recognized the right to change bargaining representatives and provided election machinery for this purpose. However, the effect of the new decertification provision is to provide a way that employees can

¹⁹ *Ibid.* See also Sen. Rep. 105, 80th Cong., 1st Sess., p. 11.

²⁰ *Matter of Herman Loewenstein, Inc.*, 21 L.R.R.M. 1032.

²¹ *Supra*, note 1, Sec. 9(c)(1)(A). This section requires that the petition be supported by a "substantial number" of employees in the bargaining unit, which under Board usage has been defined as at least 30 per cent.

change bargaining representatives for no representatives at all, thus substituting individual bargaining for collective bargaining. It should be noted, however, that once a union has been certified, such certification is good for one year, even if it loses its majority.²²

D. *One Year Rule.* Section 9(c)(3) directs the Board to hold no more than one election each year in the same unit or subdivision. Patently the effect of this provision is to delay collective bargaining for a period of time up to one year following an election in which a union fails to win recognition. Furthermore, the necessary effect of this rule will be to force unions to delay petitioning for an election until there is a reasonable certainty that the election will be won in order to avoid the consequences of the one year ban on elections. Another result of the one year ban which appears to have no reasonable basis is that in the event a union representing an industrial unit of employees loses an election, no subdivision of that unit can have an election for one year after the election in the industrial unit.

E. *Miscellaneous Procedural Changes.* In various other ways, the amended Act departs from the Wagner Act. Under the Wagner Act, the Board did not have to hold an election to determine representation in all cases, but could utilize such methods as the cross-check. Furthermore, the Board could hold pre-hearing elections where no substantial dispute appeared to exist in a representation proceeding. Under the new Act, however, it is mandatory for the Board to hold an election in representation matters, and the pre-hearing election is forbidden.²³ But it should be noted that where the parties so stipulate, consent elections can be held prior to or without hearings.²⁴

The old rules of the Wagner Act are likewise changed in respect to run-off elections. Under the original Act the Board held run-off elections only on express request. Under

²² The Board can hold no more than one election each year, see Sec. 9(c)(3). Therefore a decertification election following a certification election could not be held for one year, which leaves undisturbed the Board's present rule that certification is good for one year.

²³ *Supra*, note 1, Sec. 9(c)(1).

²⁴ *Ibid.*, Sec. 9(c)(4).

the new Act it is mandatory upon the Board to hold run-off elections in all cases in which none of the choices on the original ballot receives a majority.²⁵ Also the two choices which received the largest and second largest number of votes must be placed upon the run-off ballot.²⁶ This changes the rule followed by the old Board in respect to placing "no union" on the run-off ballot. Previously, "no union" would be put upon that ballot only if it received a plurality of all the votes cast.

F. *Appropriate Unit*. Under the new Act, *carte blanche* authority in the determination of the appropriate unit is taken away from the Board. The changes engendered by the new Act are aimed at removing certain categories of employees from a bargaining unit which was previously considered the most effective form of organization.

(1) *Craftsmen*. The Board can not now decide that a separate craft unit is inappropriate on the grounds that the craftsmen have previously been a part of a larger unit of employees, unless a majority in the proposed craft unit vote against separate representation.²⁷ Thus the Board is directed to ignore bargaining history and to do away with the policy laid down in the *American Can* case,²⁸ under which the Board refused to carve out a craft unit where there was no history of separate bargaining in the plant for that craft.

The practical effect of the new law governing craftsmen will be to allow such employees to decide for themselves in an election whether they want separate representation. It should be noted, however, that in such an election it is necessary to have a vote of the majority of the employees in the craft unit involved (not merely a majority of those voting) against separate representation before the Board can include craftsmen in a larger industrial unit.

Thus the new law heralds a renewal of the craft versus industrial unionism struggle, with the cards stacked heavily in favor of craft unions.

²⁵ *Supra*, note 1, Sec. 9(c)(3).

²⁶ *Ibid.*

²⁷ *Supra*, note 1, Sec. 9(b)(2).

²⁸ 13 N.L.R.B. 1252.

(2) *Professional Employees.* Professional employees, which includes engineers, scientists, physicians, nurses and lawyers²⁹ may no longer be included within any other unit unless in a separate election a majority of these employees have elected for inclusion in such a unit.³⁰ Here again it is important to note that it is necessary to have the authorization of a majority of all the professional employees, not merely a majority of those voting in the election.

(3) *Plant Guards.* The new Act provides that no unit may be deemed appropriate which includes plant guards along with other employees. It provides, further, that no labor organization representing plant guards shall be certified if it admits to membership employees other than guards, or is affiliated with an organization representing other employees.³¹ Thus it appears that the only union which could represent guards and use the Board processes is an independent union admitting only guards to membership.

(4) *Supervisors.* Under the new Act no union can use the Board's processes in representing supervisors, which are defined in the Board's customary way.³² This is accomplished by removing supervisors from the category of "employee" within the Act.³³ This, however, does not mean that supervisors can not join unions.³⁴ It simply means that in their negotiations with employers they must rely purely on economic strength.

(5) *Partially Organized Employees.* In the past, the Board at times fixed the appropriate bargaining unit on the basis of the extent of organization among the employees of a company, rather than on the basis of the company's entire operations. Thus, a single plant unit composed of organized employees was sometimes held appropriate, although under other circumstances a company-wide unit would have been approved. The purpose of the Board

²⁹ Sen. Rep. No. 105, *supra* note 20, p. 11. See also *supra*, note 1, Sec. 2(12).

³⁰ *Supra*, note 1, Sec. 9(b)(1).

³¹ *Ibid.*, Sec. 9(b)(3).

³² *Supra*, note 1, Sec. 2(11).

³³ *Ibid.*, Secs. 2(3) and 14.

³⁴ The Act expressly declares in Section 14 that "nothing herein shall prohibit any individual employed as a supervisor from becoming or remaining a member of a labor organization . . ."

policy obviously was to prevent the denial of bargaining rights to a group of employees pending an unknown period of time in which the other employees in a large plant would be organized.³⁵ The new Act provides, however, that the extent to which employees have organized is not to be controlling in the determination of the appropriate bargaining unit.³⁶

G. *Loss of Right to Vote.* Section 9(c)(3) of the new Act which provides that strikers who are not entitled to reinstatement are not eligible to vote in a Board election should be very carefully noted by all labor organizations. Under a Supreme Court decision it has been decided that when employees go out on a purely economic strike, employers may replace them and such employees are not entitled to reinstatement.³⁷ Although the old Board has observed this ruling, it has not denied replaced strikers the right to vote in an election where the strike was still current. Under the new Act, as soon as economic strikers are replaced they lose all rights to participate in a Board election during a strike.³⁸ Thus, under the new Act employees organized during the course of an economic strike will not be permitted to vote in a Labor Board election to secure certification of their bargaining representative if their jobs have been filled. Furthermore, the affect of Section 9(c)(3) is particularly disadvantageous to unions when considered in the light of the limitations imposed upon them in the use of the Board's processes. Since under the new Act many unions will be compelled to resort to economic strikes to enforce demands for recognition (the term economic strike also includes strikes to compel recognition without a Board certification as well as strikes for

³⁵ The Boards extent of organization theory has been judicially approved by the Supreme Court. See, *May Dept. Stores Co. v. National Labor Relations Board*, 326 U. S. 376 (1945).

³⁶ *Supra*, note 1, Sec. 9(c)(5).

³⁷ *N.L.R.B. v. Mackay Radio & Telegraph Co.*, 304 U. S. 333 (1938).

³⁸ *Supra*, note 1, Sec. 9(c)(3). Commenting on this section the majority report of the Senate stated: "When elections are conducted during a strike, situations frequently arise wherein the employer has continued to operate his business with replacement workers. If such strike is an economic one and not caused by unfair labor practices of the employer, strikers permanently replaced have no right to reinstatement." (Sen. Rep. No. 105, *supra*, note 20, p. 25.)

better working conditions), an opportunity is now opened to employers under such circumstances to replace the jobs of striking union adherents and thereby assure the denial of a vote to these employees in a subsequent election, which incidently may now be secured by an employer through use of the employer petition.

III. GENERAL CHANGES IN COLLECTIVE BARGAINING.

It has previously been mentioned that under the old Wagner Act once the parties were brought to the bargaining table on an equal basis, collective bargaining thereafter became a matter between labor and management. The parties were left free to contract regarding almost any subject matter of collective bargaining. Labor was free to use all of the coercive activities such as strikes, boycotts, secondary strikes, etc., which were protected by the Clayton³⁹ and Norris-LaGuardia Acts,⁴⁰ and there was no regulation of the internal operations of unions. Suits for breaches of collective contracts were rare because of the procedural difficulties involved. The new Act, however, limits in many respects the subject matter of collective bargaining and radically changes the rules by which the process must be conducted.

A. *Union Duty to Bargain.* The new Act now requires a union as well as an employer to meet at reasonable times and confer in good faith concerning wages, hours and conditions of employment, and the execution of a written contract embodying any agreement reached.⁴¹ It also pro-

³⁹ 38 Stat. 738 (1914), 15 U.S.C. Sec. 52.

⁴⁰ 47 Stat. 70 (1932), 29 U.S.C. Sec. 101.

⁴¹ Sec. 8(b)(3) of the Act, *supra*, note 1, makes it an unfair labor practice for a union which is the bargaining representative of the employees to refuse to bargain collectively. Sec. 8(d) of the Act defines what is meant by collective bargaining. For a good insight into what constitutes collective bargaining by a union, see *National Labor Relations Board v. Times Publishing Co.*, 72 N.L.R.B. 128. However, it should be carefully noted that the Supreme Court decision in *National Labor Relations Board v. Jones and Laughlin Steel Corp.*, 301 U. S. 1 (1937), upholding the constitutionality of the Wagner Act, is similarly applicable to the Taft-Hartley Act on the questions as to whether employers or unions need to enter into a contract. Thus it was stated: "The Act does not compel agreements between employers and employees. It does not compel any agreement whatever. It does not prevent an employer 'from refusing to make a collective contract and hiring individuals on whatever terms' the employer 'may by unilateral action determine . . . '."

vides that where there is in existence a collective bargaining contract, that no party to that contract shall terminate or modify it unless such party:

(1) Serves a written notice upon the other party to the contract of the proposed termination or modification sixty (60) days prior to the expiration date of the contract or in the event such contract contains no expiration date, sixty (60) days prior to the time it is proposed to make such termination or modification.

(2) Offers to meet and confer with the other party for the purpose of negotiating a new or modified contract.

(3) Notifies the Federal Mediation and Conciliation Service and any state mediation or conciliation service within thirty (30) days after notification to the other party to the contract of the existence of a dispute unless the dispute has been settled.

(4) Continues the contract in full effect for sixty (60) days following notice upon the other party, without resort to strike or lockout.⁴²

Should a union fail to perform any or all of the above requirements it would be guilty of an unfair labor practice in failing to bargain collectively in violation of Section 8(b)(3) of the new Act. Of particular interest is the question of the power of the Board to seek an injunction against a union which undertakes a strike in violation of the sixty (60) days cooling provision of the new Act or while refusing to bargain. Since Section 10(j) grants the Labor Board discretion to seek a preliminary injunction in the Federal District Courts against unfair labor practices, it could presumably seek to enjoin such strikes. However, the Congressional history of Section 10(j) indicates definitely that the Board's discretion in attempting to enjoin unfair labor practices is not unlimited. Instead, this discretion is definitely limited to acting in the public interest and not in vindication of purely private rights.⁴³ Thus where unions

⁴² *Supra*, note 1, Secs. 8(d)(1), (2), (3), (4).

⁴³ The majority report of the Senate Committee stated in respect to the power of the Board to seek injunctions "we have provided that the Board, acting in the public interest and not in vindication of purely private rights may seek injunctive relief in the cases of all types of unfair labor practices . . ." (Sen. Rep. No. 105, *supra*, note 20, p. 8).

strike in violation of the requirements of collective bargaining, the Board can not seek to enjoin such strikes unless the public interest is affected. Presumably, the public interest should be substantially affected before the Board can act for, otherwise, there would be little purpose in limiting the Board's discretion to enjoin unfair labor practices since all such practices somewhat affect the public interest.

B. *Union Security Contracts: (1) Closed shop, Union shop, Maintenance of Membership.* Under the new Act closed shop agreements, executed after August 22, 1947, are prohibited and the the highest union security contract which a union can enter into is the union shop or maintenance of membership agreement after certain conditions have been satisfied under the new Act⁴⁴ (provided also that a state law does not prohibit or further restrict the proposed agreement).⁴⁵

In order for a union to be in a position to negotiate a union shop or maintenance membership contract with an employer, it will as a practical matter have to comply with various formalities of the new Act. Unions will not be able to avoid the impact of the Act by undertaking informal understandings with the employer that no non-union men are to be employed or retained. Under the new Act if an employer hires or discharges an employee pursuant to a contract or informal understanding which has not been made in compliance with the formal requirements of the new Act, he will be guilty of an unfair labor practice and liable for reinstatement and back pay of the aggrieved employee.⁴⁶ Unions can likewise be held guilty of unfair labor practices in attempting to cause employers to discriminate against an employee not covered by a union shop or maintenance of membership agreement made in

⁴⁴ The closed-shop contract is indirectly abolished by Sec. 8(a)(3) which in effect provides that an employer will be guilty of an unfair labor practice if an employee is hired or fired pursuant to any contract except a union-shop or lesser union security contract entered into as provided in the Act.

⁴⁵ *Supra*, note 1, Sec. 14(b). See also H.R. Rep. 510, 80th Cong., 1st Sess., p. 60.

⁴⁶ *Ibid.*, note 42. Despite the abolition of the closed shop contract under Sec. 8(a)(3), which indirectly vests complete control over hiring in the employer, in many instances, employers are still legally obligated to hire union applicants for employment. See *infra*, circa notes 53-54 of this article.

compliance with the Act and, similarly, can be liable for back pay.⁴⁷

The formalities required by the new Act before a valid union shop or maintenance of membership agreement can be entered into are as follows:

(1) The union must be certified by the Board as the choice of a majority of employees in the appropriate bargaining unit.⁴⁸ This means that the union will as a condition precedent to certification have to comply with the registration section of the new Act, supplying the Secretary of Labor and all members of the union with information concerning its internal structure, finances, etc. The Labor Board must also be furnished with the non-Communist affidavits from all union officers.⁴⁹

(2) The union must petition the Board to conduct an election (subject to a showing that 30% of the employees desire the election) in which the majority of the eligible employees vote to authorize the union to make a union shop or maintenance of membership agreement.⁵⁰ It should be noted that the "majority" refers, not to a majority of those voting in the election, but to a majority of those eligible to vote. It is also important to note that the Board will not hold such an authorization election more than once a year.⁵¹

The law also provides:

(3) That the strongest type of union security provision which can be made is one in which employees may be required, as a condition of employment, to join the union not less than 30 days after employment or the effective date of the agreement and to remain members throughout the term of the agreement.⁵²

⁴⁷ *Supra*, note 1, Sec. 8(b)(2). Also note that Sec. 10(c) provides that "where an order directs reinstatement of an employee, back pay may be required of the employer or labor organization, as the case may be, responsible for the discrimination suffered by him".

⁴⁸ *Ibid.*, Sec. 8(a)(3).

⁴⁹ *Ibid.*, note 15.

⁵⁰ *Supra*, note 1, Sec. 8(a)(3).

⁵¹ Sec. 9(c)(3) provides that no election shall be held in any unit or subdivision thereof if during the preceding twelve-month period a valid election had been held.

⁵² *Ibid.*, note 48.

(4) The employer may not justify a discharge of an employee for non-membership in the union (a) if he has reason to believe that union membership was not open to the employee on the same terms as to other employees or (b) if he has reason to believe an employee has been expelled from the union for reasons other than his failure to pay dues.⁵³ This proviso radically affects the union's control over its internal affairs and makes it impossible to have an employee discharged who has lost his good standing in the union because of "dual unionism", labor spying or worse.

It should be noted that after a union shop or maintenance of membership contract is entered into, or even if no union security contract is executed, the union may still supply applicants for employment to the employer. However, the union can not urge the employer, and the employer is prohibited, to take union applicants in preference to non-union applicants. On the other hand in the event that a union applicant is more qualified than the non-union applicant, it appears legally proper under Section 8(a) (3) for a union to file charges of discriminatory hiring against an employer in each instance in which a non-union worker is hired in preference to a more qualified union applicant for employment. Such charges would be especially applicable to those industries in which unions have traditionally supplied the almost exclusive source of skilled labor.

(2) *Check off and Welfare funds.* Unions can still enter into an agreement with an employer involving the check-off of union dues, but this is only permitted where the employer receives a written assignment from the employee affected.⁵⁴

The restrictions on welfare funds in the new Act do not apply to funds which are financed and administered solely by an employer. In the case of union welfare funds, solely financed and administered by the union, the restrictions likewise do not apply. Except for the above situations, all other contributions of employers to union wel-

⁵³ *Ibid.*

⁵⁴ *Supra*, note 1, Sec. 302(c) (4).

fare funds come under detailed regulation in the new Act.⁵⁵ It is now unlawful for employers to pay, or unions to accept, money for welfare funds unless employees and employer are equally represented in the administration of the fund. Furthermore, the objects of the instrument establishing the fund are limited to payments for medical or hospital care, pensions, retirement or death of employees, compensation for injuries or illness resulting from occupational activity, insurance to provide for any of the foregoing, unemployment benefits, life insurance, disability and sickness insurance, or accident insurance. Criminal and injunctive penalties are provided for both unions and employers who violate this section.

The validity of a State constitutional provision which prohibited closed shop agreements was recently before the Supreme Court, where it was contended that this violated the First and Fourteenth Amendments and the Contract Clause of the Constitution.⁵⁶ The case, however, was remanded without decision on the merits, pending authoritative construction of the State constitutional provision by the State courts. If it should eventually be held that a State may not constitutionally deprive parties to a labor contract of the right to negotiate a closed shop agreement, all provisions of the Taft-Hartley Act which restrict the right of labor organizations to contract in respect to union security may, on similar principles, be held invalid.

C. *Contract Breaches.* In the past suits against labor unions for breach of contract have been difficult because many States did not entertain such suits against unions or other unincorporated societies. The new Act makes it relatively easy to sue a union in Federal District Courts for the only test which need be met is that the union being sued is in an industry affecting commerce and the court has jurisdiction over the parties.⁵⁷ Accordingly, strikes in violation of a contract, or refusal to use grievance machinery provided for in a contract may render unions liable in

⁵⁵ *Ibid.*, Sec. 302 inclusive.

⁵⁶ See, *American Federation of Labor v. Watson*, 327 U. S. 582 (1946).

⁵⁷ *Supra*, note 1, Secs. 301(b), (c).

damages to the employer, and the fact that the breach of contract was not instigated or ratified by the union itself is irrelevant.⁵⁸

Recently some unions have attempted to protect themselves against suits for breach of collective contracts by (1) refusing to agree to a no-strike clause and eliminating all language in a proposed contract (especially in the preamble) which implies an agreement not to strike (it should be cautioned, however, that the courts may nevertheless hold that all collective bargaining contracts have an implied obligation not to strike), (2) attempting to have an employer agree to a provision which relieves the union from all damages and other suits arising from violations of contract under the new Act, (3) attempting to have the employer agree to a liquidated damage clause. This last-named type of clause restricts union damages growing out of a contract violation to an amount agreed in advance by the parties.

The efficacy of this strategy on the part of the unions, of course, depends upon the courts, and cannot be predicted. The courts may not recognize the validity of the non-liability type clause on the grounds that an employer can not bargain away his legal rights. On the other hand, the liquidated damage type clause is customary in the field of contracts and has long been sustained by the courts.

D. *Curbs on the Use of Labor's Weapons.* (1) *Primary economic, primary recognition, and unfair labor strikes.* The right of employees to undertake a primary economic strike generally is not restricted under the new Act. However, there are two significant limitations upon this right which should be carefully noted. First, economic strikes in violation of a collective bargaining contract may subject the union to suit for breach of contract. Second, a purely economic strike during the 60 day cooling period, which will be discussed immediately hereafter, can result in serious consequences. Lastly, it should be remembered that economic strikers who have been replaced are now ineligible to vote in any Board election.

⁵⁸ *Ibid.*, Secs. 301(b), (e).

Nothing in the new Act prohibits either the majority or minority of the employees of an employer from striking to obtain recognition of a labor organization.⁵⁹ However, a strike to compel an employer to recognize a union where another union has already been certified by the Board, is considered a strike against the Board, and is made an unfair labor practice⁶⁰ against which it is mandatory for the Board to obtain an injunction. Also employers affected in such a situation are given a right of action for damages in Federal District Courts.⁶¹

In respect to unfair labor practice strikes, nothing in the new Act requires a union against whom unfair practices have been committed to resort to the Board. They can resort to strike action instead.

(2) *Cooling-period strikes.* It has previously been mentioned that before either party to a collective bargaining contract can modify or terminate a collective bargaining agreement 60 days written notice prior to such action must be given the other party. Under the new Act strikes during this 60 day period are forbidden. The penalty provided for strike participants is the loss of protection of the Act, i.e., the strikers may be replaced by the employer and can not vote in any Board election.⁶² Furthermore, since the duty to refrain from striking is made one of the obligations of the duty to bargain collectively,⁶³ a strike in violation of this provision is a union unfair labor practice and, consequently, may be enjoined in the discretion of the Labor Board, subject to the limitation of acting in the public interest.⁶⁴

(3) *Mass Picketing.* It is apparent from the Congressional history of Section 8(b)(1) that that provision is also aimed at the prevention of mass picketing on the theory that this type of picketing prevents access into the plant of employees who wish to work during a strike.⁶⁵ This

⁵⁹ See *infra*, note 69. See also, *Matter of Nashville Corp.*, 21 L.R.R. 73, and opinion of Labor Department solicitor in 21 L.R.R. 128.

⁶⁰ *Ibid.*, Sec. 8(b)(4)(C). See also Sen. Rep. No. 105, *supra*, note 20, p. 22.

⁶¹ See *infra* page 22 of this article.

⁶² *Supra*, note 1, Sec. 8(d).

⁶³ Sec. 8(d) defines collective bargaining.

⁶⁴ See *supra*, *circa* note 43 of this article.

⁶⁵ See *supra*, note 12.

provision is particularly vulnerable to constitutional objections, which will be discussed in some detail later.

(4) *Recognition strikes, secondary strikes and boycotts, work jurisdiction strikes.* Section 8(b)(4) makes it an unfair labor practice for a union to call strikes or to induce employees to refuse to handle materials in the course of their employment in order:

(a) to force an employer or self-employed person to join a union or an employer association.

(b) to coerce anyone to cease using or handling the products of another company, or to stop doing business with that company⁶⁶ (this provision is aimed at the secondary strike and secondary boycott). It should be noted that the language of Section 8(b)(4) is broad enough to cover such strikes and boycotts even where the purpose is to refuse to work on non-union goods or is undertaken as purely sympathetic action.⁶⁷ However, when unions use the consumption boycott (refuse to buy and urge the general public not to buy products of an employer) instead of the secondary strike or boycott against an employer this would still appear to be legal under the new Act.⁶⁸

(c) to force any employer to recognize a union if another union has been certified by the Labor Board (this provision refers to strikes against a Board certification.)

(d) to force some other employer to bargain with a union that has not been certified as the exclusive repre-

⁶⁶ The senate report respecting this provision stated: Thus, it would not be lawful for a union to engage in a strike against employer A for the purpose of forcing that employer to cease doing business with employer B; nor would it be lawful for a union to boycott employer A because employer A uses or otherwise deals in the goods of or does business with employer B (with whom the union has a dispute). This paragraph also makes it an unfair labor practice for a union to engage in the type of secondary boycott that has been conducted in New York City by local No. 3 of the I.B.E.W., whereby electricians have refused to install electrical products of manufacturers employing electricians who are members of some labor organization other than local No. 3. (See Sen. Rep. 105, *supra*, note 20, p. 22).

⁶⁷ See, New Labor Law issued by the Bureau of National Affairs, 41.

⁶⁸ In the Congressional Record of July 8, 1946, Senator Taft took the following position:

"Q. Suppose the union instead of refusing to handle his goods in other plants which that union has organized urges the general public not to buy the products of non-union manufacturers?

A. This is not affected by the Act since it is merely persuasion."

sentative⁶⁹ (thus this provision is aimed at secondary strikes and boycotts undertaken against employers who have economic relations with, process goods of, or supply an outlet for an employer from whom a union is attempting to secure recognition.)

(e) to force an employer to assign work to employees of a union or in a particular trade, craft, or class, if such work has been assigned to some other trade or class, except where the assignment of work is in violation of an order or certification of the Board (this section is aimed at work jurisdiction disputes.) In discussing this proviso Senator Murray pointed out that the language is so broad as "to proscribe the use of strikes or boycotts where an employer attempts to undermine a craft union by discriminatory assignments of work tasks to unorganized employees in another trade, craft or class."

Section 10(e) of the new Act makes it mandatory upon the Labor Board to seek injunctive relief against all violations of Section 8(b)(4), except the last involving work jurisdiction disputes. Federal District Courts are given the power to grant such relief until the Board issues its final order. Also, Section 303 of the new Act confers a cause of action for damages by any person injured by reason of any violation of Section 8(b)(4) including those violations involving work jurisdiction disputes.

(5) *National Emergency Strikes*. The Attorney General may obtain an injunction for a period of 80 days against any strike (or lockout) in a whole interstate industry or substantial part of such industry which imperils the national health or safety.⁷⁰

It is apparent from the foregoing discussion that the right to strike, picket and boycott has been subjected to

⁶⁹ The Senate report stated that this paragraph "is intended to reach strikes and boycotts conducted for the purpose of forcing another employer to recognize or bargain with a labor organization that has not been certified as the exclusive representative. It is to be observed that the primary strike for recognition (without a Board certification) is not proscribed. Moreover, strikes and boycotts for recognition are not made illegal if the union has been certified as the exclusive representative." (Sen. Rep. 105, *supra*, note 20, p. 22).

⁷⁰ *Supra*, note 1, Secs. 206-210.

far reaching limitations. It is not the purpose here to elaborate a constitutional argument. However, it should be noted that the decisions of the Supreme Court thus far respecting the constitutional right to picket have in effect recognized that picketing is a coercive weapon and its use can not be restricted by laws predicated upon picketing having an illegal objective. Accordingly, if picketing is constitutionally sanctioned as a coercive activity, there would appear to be no basis for according less protection to the strike and boycott, which are normally less coercive weapons than picketing. However, since the strike and boycott do not obviously involve elements of free speech, (which is the legal rationale used by the courts in protecting picketing) in order for the courts to protect encroachments upon the right to strike and boycott, they will probably have to rely upon the due process clauses of the Fifth and Fourteenth Amendments.⁷¹

E. *Grievance Machinery.* One of the most significant changes which the new Act makes in respect to grievance machinery derives from the provision that unions must bargain collectively, which means conference and proposals respecting questions such as grievances which arise during bargaining contracts. Thus, resort to a strike to settle a grievance without first attempting to adjust the matter through conference can subject a union to an unfair labor practice complaint. Also, where specific provisions for grievance machinery is made in a collective agreement, failure to utilize such machinery can result in a suit for breach of contract. The new Act also changes the previous Labor Board rule respecting individual grievances. Previously, individual employees could present their grievances to an employer without the bargaining representative provided that the bargaining representative was consulted at each stage of the procedure. Under the new law, the bargaining representative has only an opportunity to be present at the final adjustment. It is important to note, however, that individuals may not

⁷¹ See Ratner, *The Norris-LaGuardia Act in the Constitution* (1943), 11 Geo. Wash. L. Rev. 428.

receive any adjustment inconsistent with the bargaining contract.⁷²

It should also be noted that Section 8(b)(1) "would not permit a union to dictate who shall represent an employer in the settlement of employee grievances, or to compel the removal of a personnel director or supervisor who has been delegated the function of settling grievances."⁷³

F. *Miscellaneous.* Section 8(b)(5) makes it an unfair labor practice for a union covered by a union shop contract to charge excessive or discriminatory initiation fees. What is excessive or discriminatory will presumably depend upon past practices in the industry. The new Act also makes it an unfair labor practice for a union to cause an employer to pay money for services not performed. This provision is aimed at featherbedding tactics of some unions.⁷⁴

IV. CONCLUSION.

It is apparent that the Taft-Hartley Act represents a major shift in the labor policy of the government. In the past, the government has sought to secure for labor a greater amount of real wages accompanied by improved conditions of employment. It has sought to attain this goal through laws which encouraged and protected the bargaining efforts of the workers themselves. Accordingly, the old Wagner Act placed few limitations upon the workers' right to organize and bargain collectively, while prohibiting employer practices which interfered with these objectives. Furthermore, it made it attractive and simple for employees to utilize the peaceful administrative machinery set up to protect their rights. Other laws, such as the Norris-LaGuardia Act and the Clayton Act, in order to further increase the bargaining power of workers, guaranteed protection of the right to strike, to picket and to boycott. Further assistance to workers in their efforts to

⁷² For full discussion of Sec. 9(a) see Sen. Rep. 105, *supra*, note 20, p. 24.

⁷³ Sen. Rep. 105, *supra*, note 20, p. 21.

⁷⁴ For full discussion of Sec. 8(b)(6), See H.R. Rep. No. 245, *supra*, note 45, p. 25.

improve working conditions through collective bargaining stemmed from the encouragement of union security contracts, such as the closed-shop.

The Taft-Hartley Act imposes considerable restraints upon the right of employees to organize, to bargain collectively and to utilize instruments of self help. Employers are accorded increased legal rights to combat union organization both acting on their own and through use of the Labor Board's processes, while the right of employees to utilize the peaceful machinery of the Labor Board or to use instruments of self help to protect its organizational and collective bargaining efforts has been considerably diminished. Furthermore, union security is in many instances impossible, because of the conditions precedent imposed upon union security contracts under the new Act. It is obvious then that the governmental labor policy has been completely reversed in that the full sanction of law now exists to diminish the bargaining power of labor.

While certain limited provisions of the new Act may be justified as an attempt to correct the extremist activity of some unions, certainly the overall abandonment of governmental support to workers in their struggle further to better working and living conditions can not be justified on this basis. It is anticipated that the growth and evolution of industrial and political democracy will inevitably cause a revaluation of the governmental role in the economic struggle.